In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1176

TINO BARZIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy and mail fraud, in violation of 18 U.S.C. 371, 1341 and 1342.[1] He was sentenced to three years' probation and a fine of $1,500. The court of appeals affirmed *per curiam* (Pet. App. A-1).

1. Petitioner seeks reversal of his conviction because testimony and exhibits received by a grand jury

[1] Two co-defendants were tried jointly with petitioner, one of whom was convicted of conspiracy and substantive offenses while the other was convicted only of conspiracy. Three other defendants pleaded guilty before trial. The remaining defendant was a fugitive.

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were turned over to a second grand jury, which was selected pursuant to a new statute that had become effective after the first grand jury was discharged, 28 U.S.C. (Supp. V) 1861–1867. The fact that testimony had been heard and exhibits had been viewed by a grand jury selected by a different method under laws then operative in no way reflects upon the trustworthiness of the evidence thus received. The law does not require a "saving clause," as petitioner seems to argue (Pet. 7), to preserve legally admissible, relevant evidence for consideration by any properly constituted body.

2. The substance of the scheme shown here consisted in using stolen credit cards to purchase airline tickets which were then sold at a fraction of their face value. On some fifteen occasions between July 1967 and July 1968, petitioner bought airline tickets at a flat fifty percent of their face value from co-defendant Tortora to pay for the transportation of the band which he was managing. Tortora took the money that he thus received from petitioner and divided it equally between himself and whichever co-conspirator had procured the tickets by a stolen credit card. The evidence to prove petitioner's participation in this scheme would have been substantially the same whether he was tried separately or with his two co-defendants. Grand jury testimony of co-defendant Irving was admitted, but this made no mention of petitioner. Thus the rule in *Bruton* v. *United States*, 391 U.S. 123, was not violated. *White* v. *United States*, 415 F. 2d 292 (C.A. 5); *United States* v. *Lipowitz*, 407 F. 2d

597, 601–603 (C.A. 3). No objection was made to the admission of this testimony and no limiting instructions were requested.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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